

Tentative Rulings for July 8, 2021
Department 403

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

19CECG04061 *Foster v. Gamoian* (Dept. 403)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

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Tentative Ruling

Re: ***Robillard v. Fresno Community Hospital and Medical Center et al.***

Superior Court Case No. 15CECG01236

Hearing Date: July 8, 2021 (Dept. 403)

Motion: Summary Judgment or in the alternative, summary
Adjudication by Defendant Chaudhry dba Valley
Cardiac Surgery Medical Corporation

Tentative Ruling:

To grant the motion for summary adjudication of the third and seventh causes of action pursuant to CCP Sec. 437. To deny the motion as to the sixth cause of action. To grant Defendant's request for judicial notice of Exhibits A through G pursuant to Evidence Code Secs. 452(a), 452(c) and 452(d)(1). To take judicial notice sua sponte pursuant Evidence Code Sec. 452(c) of the postings on the website of the California Secretary of State for the entity known as Valley Cardiac Surgery Medical Corporation.

Explanation:

Third Cause of Action—Retaliation and Wrongful Termination in violation of Labor Code Sec. 1102.5

Labor Code Sec. 1102.5 states in full:

(a) An employer, or any person acting on behalf of the employer, shall not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

(b) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal

statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

(c) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation.

(d) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for having exercised their rights under subdivision (a), (b), or (c) in any former employment.

(e) A report made by an employee of a government agency to their employer is a disclosure of information to a government or law enforcement agency pursuant to subdivisions (a) and (b).

(f) In addition to other penalties, an employer that is a corporation or limited liability company is liable for a civil penalty not exceeding ten thousand dollars (\$10,000) for each violation of this section.

(g) This section does not apply to rules, regulations, or policies that implement, or to actions by employers against employees who violate, the confidentiality of the lawyer-client privilege of Article 3 (commencing with Section 950) of, or the physician-patient privilege of Article 6 (commencing with Section 990) of, Chapter 4 of Division 8 of the Evidence Code, or trade secret information.

(h) An employer, or a person acting on behalf of the employer, shall not retaliate against an employee because the employee is a family member of a person who has, or is perceived to have, engaged in any acts protected by this section.

(i) For purposes of this section, "employer" or "a person acting on behalf of the employer" includes, but is not limited to, a client employer as defined in paragraph (1) of subdivision (a) of Section 2810.3 and an employer listed in subdivision (b) of Section 6400.

(j) The court is authorized to award reasonable attorney's fees to a plaintiff who brings a successful action for a violation of these provisions.

Accordingly, "when an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170.)

Here, the Plaintiff was terminated by Defendant Community Medical Centers: not the moving Defendant. See First Amended Complaint at para. 5. By the same token, Labor Code Sec. 1102.5 recognizes that a person may "act on behalf of an employer." *Id.* The case of *St. Myers v. Dignity Health* (2019) 44 Cal.App.5th 301 sets forth the factors to be considered as to when a person "acts on behalf of an employer" such that liability can be imposed on the individual. It states:

"Factors to be taken into account in assessing the relationship of the parties include payment of salary or other employment benefits and Social Security taxes, the ownership of the equipment necessary to performance of the job, the location where the work is performed, the obligation of the

defendant to train the employee, the authority of the defendant to hire, transfer, promote, discipline or discharge the employee, the authority to establish work schedules and assignments, the defendant's discretion to determine the amount of compensation earned by the employee, the skill required of the work performed and the extent to which it is done under the direction of a supervisor, whether the work is part of the defendant's regular business operations, the skill required in the particular occupation, the duration of the relationship of the parties, and the duration of the plaintiff's employment. [Citations.] "Generally, ... the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." ' ' (Vernon v. State of California (2004) 116 Cal.App.4th 114, 124-125, 10 Cal.Rptr.3d 121 (Vernon), fn. omitted.) The most important factor is "the defendant's right to control the means and manner of the workers' performance."

Id. at p. 126, 10 Cal.Rptr.3d 121.

The Court has reviewed the evidence submitted by the Plaintiff in support of his contention that Defendants Choudhry and Valley Cardiac Medical Corporation "acted on behalf" of Defendant Community Regional Medical Center. See Declaration of Jones and exhibits attached thereto. At best the evidence shows that Defendant Choudhry may have exerted influence within his sphere as a cardiac surgeon and board member/administrator at the Hospital. But influence, however great, is not tantamount to acting on behalf of an employer. Upon full consideration, the evidence does not meet the factors set in *St. Myers*, supra. Therefore, the Defendant has met his burden of proof pursuant to CCP Sec. 437c(p)(2) and the motion will be granted.

Sixth Cause of Action—Intentional Interference with Contract

This cause of action is entitled intentional interference with contract. See Exhibit A attached to Defendant's Request for Judicial Notice. Defendant moves for summary adjudication on the grounds that the requirement that the interference must be wrongful independent of the interference itself cannot be shown citing *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393. See Memorandum of Points and Authorities at page 7 lines 13-24 and page 8 lines 1-12. However, this requirement is applicable only to a cause of action for intentional interference with prospective economic relations. *Id.* at 379. Here, the cause of action, though poorly pleaded, purports to allege a cause of action for intentional interference with contract. As stated in *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26: "Wrongfulness independent of the inducement to breach the contract is not an element of the tort of intentional interference with existing contractual relations, however." *Id.* at 55. Therefore, the moving Defendant has not met his burden of proof pursuant to CCP Sec. 437c(p)(2) and the motion will be denied.

Seventh Cause of Action—Retaliation in violation of Gov. Code Sec. 12940

As a matter of law, anyone not named in the caption or body of the DFEH complaint cannot be named as a defendant in a civil suit. [*Cole v. Antelope Valley Union High School Dist.* (1996) 47 Cal.App.4th 1505, 1515—merely stating additional names in a

Res Judicata/Collateral Estoppel

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Issued By: KCK on 07/06/21
(Judge's initials) (Date)

Tentative Ruling

Re: **Megan Zupancic v. Stephen Labiak**
Superior Court Case No. 19CECG04425

Hearing Date: July 8, 2021 (Dept. 403)

Motions (x2): Defendant Stephen Labiak's Demurrer and Motion to Strike

Tentative Ruling:

To sustain the demurrer to causes of action one (negligence) and two (legal malpractice), based upon Code of Civil Procedure section 430.10, subdivision (e) [failure to allege facts sufficient to state a cause of action].

To grant defendant's motion to strike plaintiff's request for punitive damages *only*.

Plaintiff is granted 20 days' leave to amend. The time in which an amended pleading may be filed will run from service by the clerk of the minute order. All new allegations in the amended complaint are to be set in **boldface** type.

Explanation:

This case was filed on December 9, 2019. Two causes of action are alleged: (1) negligence; and (2) legal malpractice. Defendant Stephen Labiak now demurs to both causes of action. Each is examined below.

1. Negligence

The elements for negligence are: (1) a legal duty owed to the plaintiff to use due care; (2) breach of duty; (3) causation; and (4) damage to the plaintiff. (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 318.)

The court finds that plaintiff has failed to allege adequate facts to support her claim for negligence. (Code Civ. Proc., § 430.10, subd. (e).)

2. Legal Malpractice

To state a cause of action for legal malpractice, plaintiff must allege: "(1) the duty of the attorney to use such skill, prudence and diligence as members of the profession commonly possess; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage." (*Blanks v. Seyfarth Shaw* (2009) 171 Cal.App.4th 336, 356-357; *Kemper v. County of San Diego* (2015) 242 Cal.App.4th 1075, 1089.)

The court also finds that plaintiff has failed to allege adequate facts to support her claim for malpractice. (Code Civ. Proc., § 430.10, subd. (e).)

Motion to Strike

A motion to strike can be used to cut out any “irrelevant, false or improper” matters or “a demand for judgment requesting relief not supported by the allegations of the complaint.” (Code Civ. Proc., § 431.10, subd. (b); see also *Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 164 [A motion to strike is the proper procedure to challenge an improper request for relief or improper remedy within a complaint].)

Here, defendant moves to strike the following portions of the complaint: (1) cause of action one – negligence; (2) cause of action two – legal malpractice; (3) requests for damages; (4) prayer for compensatory damages; and (5) request for exemplary damages.

In light of the above ruling, the court declines to rule on the majority of defendant's arguments. (See *Consolidated Vultee Aircraft Corp. v. United Auto* (1946) 27 Cal.2d 859, 862-863.) However, plaintiff's request for exemplary damages is stricken because plaintiff has failed to allege any facts showing oppression, fraud, or malice. (*Lehto v. Underground Constr. Co.* (1977) 69 Cal.App.3d 933, 944 [Plaintiff must specifically plead the facts and circumstances which purportedly give rise to liability for punitive damages.]; see also *Blegen v. Superior Court* (1981) 125 Cal.App.3d 959, 963 [same].)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued by: KCK on 07/06/21
(Judge's initials) (Date)

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Tentative Ruling

Re: ***In re: Yiven Yang***
Superior Court Number: 21CECG01176

Hearing Date: July 8, 2021 (Dept. 403)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

The Court intends to grant the petition, contingent upon counsel's provision of the fee agreement as set forth in attachment 18(a) of the petition, and the court's satisfaction after review thereof, that the requested fee is appropriate. Petitioner and Claimant do not need to appear at the hearing.

Pursuant to California Rules of Court, Rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK on 07/06/21.
(Judge's initials) (Date)